



Fletcher, Heald & Hildreth

1300 NORTH 17th STREET, 11th FLOOR
ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400
FAX: (703) 812-0486
www.fhhlaw.com
www.commlawblog.com

PUBLIC VERSION

September 8, 2017

VIA ECFS

Marlene Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *AT&T Corp. v. Iowa Network Services, Inc.*
FCC Docket No. 17-56
Bureau ID No. EB-17-MD-001


Dear Ms. Dortch:

On behalf of Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), transmitted herewith for filing is the Public version of Aureon's Opposition to Motion to Strike of AT&T filed in the above-referenced proceeding. On February 24, 2017, the FCC staff entered a Protective Order covering confidential materials submitted in this proceeding. Pursuant to the terms of the Protective Order, certain information has been designated by the parties as "Third Party Highly Confidential," "Highly Confidential," or "Confidential." As further detailed in the Protective Order, only four designated executives of Aureon and of AT&T are permitted to review Highly Confidential information. The public version of this submission redacts all confidential information as required by the Protective Order.

A Highly Confidential redacted version of this submission is being filed contemporaneously with the Secretary's Office. No Third Party Highly Confidential or Confidential version will be filed as this submission only contains Highly Confidential information.

Should there be any questions with respect to this matter, please feel free to contact the undersigned.

Respectfully submitted,


James U. Troup
Tony S. Lee

*Counsel for Iowa Network Services, Inc.
d/b/a Aureon Network Services*

Enclosures

cc: Michael J. Hunseder, Counsel for AT&T
James F. Bendernagel, Jr, Counsel for AT&T
Lisa Griffin, FCC
Anthony J. DeLaurentis, FCC
Adam Suppes, FCC
Sandra Gray-Fields, FCC
Christopher Killion, FCC

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
AT&T CORP.,)
) Docket No. 17-56
Complainant,)
) Bureau ID No. EB-17-MD-001
vs.)
)
IOWA NETWORK SERVICES, INC., d/b/a)
AUREON NETWORK SERVICES)
)
Defendant.)

**OPPOSITION OF IOWA NETWORK SERVICES, INC. D/B/A
AUREON NETWORK SERVICES TO MOTION TO STRIKE OF AT&T CORP.**

James U. Troup
Tony S. Lee
Keenan P. Adamchak
Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street, Suite 1100
Arlington, VA 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
troup@fhhlaw.com
lee@fhhlaw.com
adamchak@fhhlaw.com

*Counsel for Iowa Network Services, Inc.
d/b/a Aureon Network Services*

September 8, 2017

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
AT&T CORP.,)
) Docket No. 17-56
Complainant,)
) Bureau ID No. EB-17-MD-001
vs.)
)
IOWA NETWORK SERVICES, INC., d/b/a)
AUREON NETWORK SERVICES)
)
Defendant.)

**OPPOSITION OF IOWA NETWORK SERVICES, INC. D/B/A
AUREON NETWORK SERVICES TO MOTION TO STRIKE OF AT&T CORP.**

Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”), by its undersigned attorneys, and pursuant 47 C.F.R. § 1.727(c), files its Opposition to AT&T Corp.’s (“AT&T”) Motion to Strike portions of Aureon’s reply brief and supporting declarations.

I. Aureon’s Reply Brief Appropriately Responded to New Information and New Arguments Raised for the First Time in AT&T’s Initial Brief and Supporting Declaration.

AT&T argues that significant portions of Aureon’s reply brief and supporting declarations should be stricken because those documents allegedly do not comply with the requirement that full legal and factual support must be submitted with a party’s initial filings with Commission.¹ However, contrary to AT&T’s contentions, the information in Aureon’s reply brief and supporting declarations could not have been presented earlier because they were in direct response to new arguments and new analyses that were presented for the first time in AT&T’s initial brief and supporting declaration by Daniel Rhinehart.

¹ AT&T Motion at 5.

A. Aureon's Reply Brief and Supplemental Declarations Addressed AT&T's New Analysis of Data in Table 1 of Jeff Schill's Declaration, and a New Lease Rate Comparison Summarized in Table K of Mr. Rhinehart's Declaration.

Much of AT&T's initial brief involved allegations arising from the data provided in Table 1 to Jeff Schill's declaration that was filed with Aureon's Answer. Aureon timely submitted the data in Table 1 by including it with Aureon's Answer ("Answer Table 1"). As explained in Aureon's Answer at ¶ 127, Aureon's Legal Analysis at 54, and the Schill Decl. at ¶¶ 16, 26, **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[[END HIGHLY CONFIDENTIAL]]

In its initial brief, AT&T included a 20 page supplemental declaration by Mr. Rhinehart, which provided entirely new calculations based on the data in Answer Table 1. Aureon did not have an opportunity to respond to that new manipulation of the data in Answer Table 1 until Aureon filed its reply brief. **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

² See Rhinehart Supp. Decl. ¶¶ 16-32.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[[END HIGHLY CONFIDENTIAL]]**

The declaration of William Warinner and the related portion of Aureon's reply brief that AT&T wants the Commission to strike directly respond to the comparison in AT&T's reply brief between AT&T's newly-devised lease rate revenue requirement from Rhinehart Table K and the projections in Aureon's tariff filings. Mr. Warinner was identified in Aureon's Answer as a person with first-hand knowledge of the facts asserted in the Answer.³ **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³ Aureon's Answer at 105.

⁴ Even if, *arguendo*, AT&T's recalculations showing CWF cost understatement in 2012, and CWF cost overstatement in 2014 were correct, which it is not, under earnings in one year can offset over earnings in another year for the carrier to remain below the FCC maximum authorized rate of return. *See generally Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [[END

HIGHLY CONFIDENTIAL]] In contrast, despite AT&T's burden of proof,⁶ AT&T has not submitted any rate of return calculations in the record, and therefore, AT&T's allegations that the CEA tariff rate is unreasonable are unsupported by any evidence that the CEA tariff rate caused the Access Division to earn in excess of the authorized rate of return prescribed by the

⁵ See also *Virgin Islands Tel. Corp.*, 989 F.2d at 1233 (citing and quoting *Communications Satellite Corp.*, Memorandum Opinion & Order, 3 FCC Rcd. 2643, 2647 (1988) ("FCC has 'long recognized the imprecision inherent in requiring carriers to set tariff rates that will produce the exact level of revenues necessary to produce the anticipated return'" (other citation omitted)).

⁶ AT&T bears the burden of establishing that Aureon's CEA rate is unreasonable. See *Sprint Commc'ns Co., L.P. v. MGC Commc'ns, Inc.*, Memorandum Opinion & Order, 15 FCC Rcd. 14027, 14029, ¶ 5 (2000) (emphasis added) ("[T]he . . . question [regarding] whether MGC's rate is unreasonable . . . is presented in the context of a section 208 complaint challenging the rate under section 201(b). In such circumstances, it is well settled that *the complainant bears the burden of establishing that the challenged rate is unreasonable.*" (citing *AT&T Corp. v. Bell Atlantic Corp.*, Memorandum Opinion & Order, 14 FCC Rcd. 556, 594, 602, ¶¶ 88, 108 (1998); *Infonxx, Inc. v. New York Tel. Co.*, Memorandum Opinion & Order, FCC 97-359, File No. E-96-26, ¶ 16 (1997); *Beehive Tel., Inc. v. Bell Operating Cos.*, Memorandum Opinion & Order, 10 FCC Rcd. 10562, 10566, ¶¶ 23-24 (1995), *aff'd after voluntary remand*, 12 FCC Rcd. 17930 (1997))).

PUBLIC VERSION

Commission. A tariff rate that does not cause a carrier to earn in excess of the authorized rate of return is by definition just and reasonable.⁷

[[BEGIN HIGHLY CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹

[REDACTED]

[REDACTED] [[END HIGHLY CONFIDENTIAL]] in September 2012, the Commission's *Alpine* decision prohibited LECs from leasing circuits to increase the transport mileage they provided to IXC. [[BEGIN HIGHLY CONFIDENTIAL]] [REDACTED]

⁷ Carriers under a rate of return regime have flexibility "to fashion a rate that [is] 'reasonable,' i.e., would not result in a return above the maximum allowed." *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995).

⁸ [[BEGIN HIGHLY CONFIDENTIAL]] [REDACTED]

[[END HIGHLY CONFIDENTIAL]]

⁹ The lack of any actual reduction in the Access Division's network costs in 2012 is consistent with the Commission's observation in the *Alpine* case that "[t]he leases did not alter the functionality of INS's or the Iowa LECs' networks." *AT&T Corp. v. Alpine Commc'ns, LLC*, Memorandum Opinion & Order, 27 FCC Rcd. 11511, 11516 ¶ 13 (Sept. 12, 2012) ("*Alpine*").

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[[END HIGHLY CONFIDENTIAL]]** Contrary to AT&T's accusations,¹⁰ the 2013 tariff filing expressly mentioned the *Alpine* decision to explain the tariff rate increase. The 2013 tariff filing stated: "INAD's revenue requirement reflects an increase in transport costs that INS will incur to transport the traffic of interexchange carriers the additional mileage resulting from the Commission's decision in *AT&T Corp. v. Alpine Communications, LLC*, 27 FCC Red 11511 (2012)."¹¹

[[BEGIN HIGHLY CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ AT&T Motion to Strike at 11 **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED] **[[END HIGHLY CONFIDENTIAL]]**

¹¹ See Aureon Answer Ex. 13, Iowa Network Access Division Description and Justification at § 5 (June 17, 2013).

[REDACTED]¹² [REDACTED]
[REDACTED]¹³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[[END HIGHLY
CONFIDENTIAL]]**

**B. Aureon's Reply Brief and Supplemental Declarations Also
Addressed AT&T's New Fiber Cost Allocation Analysis
Summarized in Table L of Mr. Rhinehart's Declaration.**

In its initial submissions in this case, Aureon explained that circuit lease rates could not be linearly scaled from a DS-0 circuit to a DS-3 circuit simply by multiplying the cost of a DS-0 by 672, and that Aureon provisioned circuits at the DS-1 level.¹⁴ Nevertheless, **[[BEGIN HIGHLY
CONFIDENTIAL]]** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹² Warinner Decl. ¶ 12.

¹³ *Id.*

¹⁴ Aureon Answer, Ex. A, Schill Decl. ¶¶ 6 (discussing Rhinehart's Third Observation), 23;
[[BEGIN HIGHLY CONFIDENTIAL]] [REDACTED]
[REDACTED] **[[END HIGHLY CONFIDENTIAL]]**

[REDACTED]

[REDACTED] **[[END HIGHLY CONFIDENTIAL]]**

Aureon's reply brief was also the first opportunity for Aureon to directly respond to why it would be inappropriate to **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED]

[REDACTED]¹⁵ [REDACTED]

[REDACTED]

[REDACTED]¹⁶ [REDACTED]

[REDACTED]¹⁷ [REDACTED]

[REDACTED]¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ AT&T Initial Brief at 6-8; Rhinehart Supp. Decl. ¶¶ 16-32.

¹⁶ Aureon Reply Brief at 1-3.

¹⁷ Aureon Answer, Ex. A, Schill Decl. at 5, 16-17; Hilton Second Supp. Decl. ¶¶ 2-5.

¹⁸ Rhinehart Supp. Decl. ¶ 20.

¹⁹ *Id.* ¶ 22.

[REDACTED]

[REDACTED]²⁰

[REDACTED]

[REDACTED]

[REDACTED]²¹ [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]²² [REDACTED]

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[REDACTED]

[REDACTED]

²⁰ Aureon Answer, Exhibit 63, NECA Reporting Guidelines, NRG 4.19, at 7.

²¹ *Id.* at 3.

²² *Id.* at 8.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²³ [REDACTED]

[REDACTED]

[REDACTED]²⁴ **[[END HIGHLY CONFIDENTIAL]]** As Mr. Schill stated in his initial declaration, all of Aureon’s circuits, regardless of capacity level, are provisioned using a combination of transmission equipment (central office equipment, or “COE”) and outside plant equipment (cable and wire facilities, or “CWF”).²⁵ **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²³ Hilton Second Supp. Decl. ¶ 3.

²⁴ *Id.* ¶¶ 3-5.

²⁵ Schill Decl. ¶ 23.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

²⁶

[[END HIGHLY CONFIDENTIAL]]

In other Section 208 formal complaint proceedings, when parties have filed motions to strike arguing that information included in briefs should have been submitted earlier in the proceeding, it has been customary for the Commission to deny the motion and accept the information “[i]n the interest of compiling a more complete record.”²⁷ A similar approach should be followed by the Commission in this case, especially when, as here, the first opportunity for Aureon to respond to the new data computations in AT&T’s initial brief was in Aureon’s reply brief.


²⁶ Warinner Decl. ¶ 4.

²⁷ See, e.g., *Ascom Commc’ns Co. v. Sprint Commc’ns Co.*, Memorandum Opinion & Order, 15 FCC Rcd. 3223, 3236, n.76 (2000).

II. Conclusion

AT&T avers that certain information and analyses in Aureon's reply brief should have been submitted with Aureon's initial filing. However, AT&T refuses to hold itself to the same standard, and filed new information and new analyses that AT&T did not disclose to Aureon before AT&T submitted its initial brief. Aureon's reply brief and declarations responded to new information and new analyses presented for the first time in AT&T's initial brief. AT&T's request to strike any parts of Aureon's submission should be denied to ensure a complete record, which will more fully inform the FCC's decision on AT&T's Complaint, and provide the most effective guidance to the district court on its primary jurisdiction referral.

Respectfully submitted,



James U. Troup

Tony S. Lee

Keenan P. Adamchak

Fletcher, Heald & Hildreth, PLC

1300 N. 17th Street, Suite 1100

Arlington, VA 22209

Tel: (703) 812-0400

Fax: (703) 812-0486

troup@fhhlaw.com

lee@fhhlaw.com

adamchak@fhhlaw.com

Counsel for Iowa Network Services, Inc.

d/b/a Aureon Network Services

Dated: September 8, 2017

TABLE OF EXHIBITS

<u>Exhibit</u>	<u>Title</u>
82	Additional Excerpts from Deposition of Jeff Schill

EXHIBIT 82

ADDITIONAL EXCERPTS FROM DEPOSITION OF JEFF SCHILL

**HIGHLY CONFIDENTIAL
MATERIALS OMITTED**

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CERTIFICATE OF SERVICE

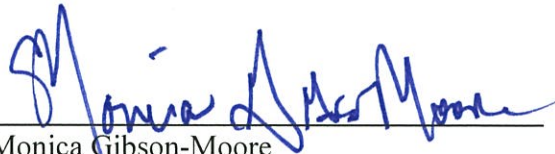
I, Monica Gibson-Moore, do hereby certify that on this 8th day of September, 2017, copies of the foregoing Opposition to the Motion to Strike of AT&T Corp. were sent to the following:

By Electronic Mail and Hand-Delivery:

Lisa Griffin, Esq.
Rosemary McEnery, Esq.
A.J. DeLaurentis, Esq.
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
lisa.griffin@fcc.gov
rosemary.mcenery@fcc.gov
anthony.delaurentis@fcc.gov

By Electronic Mail:

Michael Hunseder, Esq.
James Bendernagel, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
mhunseder@sidley.com
jbbendernagel@sidley.com



Monica Gibson-Moore